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# Lee Soo You (trading under the name and style of Ak Piling Construction) v Pembinaan Wincon Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-2514–10 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
19 MAY 2014

*Bankruptcy — Capacity of bankrupt — Competency to manage company — Undischarged bankrupt signed subcontract on behalf of wife-owner of subcontract and acted as manager of works — Bankrupt failed to show he had prior permission of Director of Insolvency to work as manager or carry on business — Whether bankrupt's testimony concerning performance as manager of subcontract unacceptable by court — Whether bankrupt legally incompetent to act on wife's behalf in subcontract — Whether wife abandoned performance of subcontract and was party at fault*

The appeal was against the dismissal by the High Court of the appellant's claim against the respondents and the allowing of the first respondent's counterclaim against the appellant. The first respondent ('R1') awarded the appellant a subcontract to carry out piling works in its project in Sri Lanka. The subcontract was signed on the appellant's behalf by her husband, PW1, who acted as the appellant's manager for the contract but who was at the material time an undischarged bankrupt. After carrying out piling works for five months, the appellant's workers returned to Malaysia for the Chinese New Year holidays and thereafter did not return to Sri Lanka to resume work. Despite their failure to return, R1 continued to make advance payments under the subcontract to the appellant for seven months and sometime after that, R1 shipped the appellant's equipment and machinery back to Malaysia. The appellant claimed R1 had repudiated the contract by failing to request her workers to return to Sri Lanka to resume the piling works. She sued for loss of profits, rental of equipment, damages for conversion and detinue of the equipment and a declaration that the second and third respondents were jointly liable under s 304 of the Companies Act 1965 ('Act') for the debt owing by R1 as they had allegedly behaved fraudulently. R1 contended that it had never terminated the contract but that it was the appellant who had abandoned the same. R1 counterclaimed for the advances it had made to the appellant and other expenses incurred including the cost of shipping the appellant's equipment and machinery back to Malaysia.

**Held,** dismissing the appellant's claim and affirming the decision of the High Court:

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(1) The trial judge was correct to hold that the appellant's claim could be dismissed solely on the ground of PW1's bankruptcy. PW1 failed to produce documentary proof that he had the previous permission of the official assignee/Director of Insolvency to work as the appellant's manager and to enter into and carry on the appellant's business. Without such evidence, it was clear PW1 had taken part directly or indirectly in the management of AK Piling Construction in contravention of s 38(1) of the Bankruptcy Act 1967. Without the requisite permission, PW1 was legally incompetent to act for the appellant and his evidence on his performance as manager of the appellant's subcontract could not be accepted by the court. Without PW1's evidence, the appellant was not in a position to even start to prove her case as her other witness, PW2, was only able to testify in support of the purported evidence of PW1 (see para 24(a)–(e)).

(2) The appellant wrongfully terminated the subcontract when her workers failed to return to Sri Lanka to resume the piling works. R1 did not at any time terminate or repudiate the contract; on the contrary, it was the appellant who had abandoned it. Despite the appellant failing to send her workers back, R1 continued to treat the contract as subsisting and continued to make advance payments to the appellant in expectation of the appellant's workers returning (see para 40).

(3) As R1 did not terminate the subcontract, the appellant, as the defaulting party, was not entitled to commence the action against R1 and was also not entitled to any of the heads of damages claimed. Her claim against the second and third respondents under s 304 of the Act was also unfounded and unsupported by evidence (see paras 46–47).

**[Bahasa Malaysia summary**

Rayuan adalah terhadap keputusan oleh Mahkamah Tinggi berkenaan tuntutan perayu terhadap responden dan kebenaran tuntutan balas responden pertama terhadap perayu. Responden pertama ('R1') mengawardkan perayu subkontrak untuk menjalankan kerja cerucuk dalam projek di Sri Lanka. Subkontrak itu ditandatangani bagi pihak perayu oleh suaminya, PW1, yang bertindak sebagai pengurus perayu bagi kontrak tersebut tetapi pada masa yang material seorang bankrap. Selepas menjalankan kerja-kerja cerucuk selama lima bulan, pekerja perayu kembali ke Malaysia untuk cuti Tahun Baru Cina dan selepas itu tidak pulang ke Sri Lanka untuk menyambung semula kerja. Walaupun kegagalan mereka untuk pulang, R1 terus membuat pembayaran terlebih dahulu di bawah subkontrak untuk perayu selama tujuh bulan dan beberapa waktu selepas itu, R1 menghantar peralatan dan jentera perayu ke Malaysia. Perayu mendakwa R1 telah membatalkan kontrak kerana gagal untuk meminta pekerja untuk pulang ke Sri Lanka untuk menyambung semula kerja-kerja cerucuk. Dia mendakwa kehilangan keuntungan, sewa peralatan, ganti rugi bagi penukaran dan detinu peralatan dan deklarasi

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bahawa responden kedua dan ketiga bertanggungjawab bersama di bawah s 304 Akta Syarikat 1965 ('Akta') bagi hutang yang terhutang oleh R1 kerana mereka didakwa melakukan penipuan. R1 menegaskan bahawa ia tidak pernah menamatkan kontrak tetapi ia adalah perayu yang telah membatalkan yang sama. R1 menuntut balas untuk pembayaran pendahuluan yang telah dibuat kepada perayu dan perbelanjaan lain yang ditanggung termasuk kos penghantaran peralatan dan jentera perayu kembali ke Malaysia.

**Diputuskan,** menolak tuntutan perayu dan mengesahkan keputusan Mahkamah Tinggi:

(1) Hakim perbicaraan adalah betul dalam memutuskan bahawa tuntutan perayu boleh ditolak semata-mata atas alasan kebankrapan PW1 ini. PW1 gagal mengemukakan bukti dokumentar bahawa dia mempunyai kebenaran sebelumnya daripada pegawai pemegang harta/Pengarah Insolvensi untuk bekerja sebagai pengurus perayu dan untuk memasuki ke dalam dan menjalankan perniagaan perayu. Tanpa apa-apa keterangan, adalah jelas PW1 telah mengambil bahagian secara langsung atau tidak langsung dalam pengurusan AK Piling Construction bertentangan dengan s 38(1) Akta Kebankrapan 1967. Tanpa kebenaran yang diperlukan, PW1 tidak kompeten di sisi undang-undang untuk bertindak bagi perayu dan keterangannya kepada prestasinya sebagai pengurus subkontrak perayu tidak boleh diterima oleh mahkamah. Tanpa keterangan PW1, perayu tidak berada dalam kedudukan walaupun untuk mula membuktikan kesnya kerana saksi lainnya, PW2, hanya mampu untuk memberi keterangan bagi menyokong keterangan yang dikemukakan oleh PW1 (lihat perenggan 24(a)–(e)).

(2) Perayu secara salah menamatkan subkontrak apabila pekerjanya gagal untuk kembali ke Sri Lanka untuk menyambung semula kerja-kerja cerucuk. R1 tidak pada bila-bila masa menamatkan atau membatalkan kontrak; sebaliknya, ia adalah perayu yang telah meninggalkannya. Walaupun perayu gagal menghantar pekerja kembali, R1 terus menganggap kontrak sebagai wujud dan terus membuat bayaran pendahuluan kepada perayu dengan anggapan pekerja perayu akan kembali (lihat perenggan 40).

(3) R1 tidak menamatkan subkontrak, perayu, sebagai pihak yang ingkar, tidak berhak mengambil tindakan terhadap R1 dan juga tidak berhak kepada mana-mana asas ganti rugi dituntut. Tuntutannya terhadap responden kedua dan ketiga di bawah s 304 Akta juga tidak berasas dan tidak disokong oleh keterangan (lihat perenggan 46–47). ]

**Notes**

For a case on competency to manage company, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) para 3089.

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**Cases referred to**

*Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd* [2007] 7 MLJ 506, CA (refd)

*Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 450, CA (refd)

*Topps Co Inc v Mally Jaya Sdn Bhd* [1998] 5 MLJ 744, HC (refd)

**Legislation referred to**

Bankruptcy Act 1967 s 38(1)

Companies Act 1965 s 304

Contracts Act 1950 s 40

**Appeal from:** Civil Suit No 22NCVC-1270–12 of 2011 (High Court, Kuala Lumpur)

*Balbir Singh (Ho Hon Keong with him) (Najiana Wan Balbir & Assoc) for the appellant.*

*Harcharan Singh (Harcharan Singh Sidhu & Assoc) for the respondents.*

**Mah Weng Kwai JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This appeal (Case No 18 on the hearing list) was heard together with two other appeals namely Civil Appeal No W-02(NCVC)(W)-1465–02 of 2012 ('Case No 17') and Civil Appeal No W-02(NCVC)(W)-3004–12 of 2012 ('Case No 19').

**[2]** After hearing the appeals, the court unanimously decided to dismiss the appeal with costs in case Nos 17 and 18 and allowed the appeal with costs in case No 19.

**[3]** The appellants in case Nos 17 and 18 have filed their notices of motion for leave to appeal to the Federal Court. The respondent in case No 19, who is the appellant in case No 17, however has not filed its notice of motion for leave to appeal to the Federal Court although the appeal (against the order of dismissal of the counterclaim by the High Court judge) by the appellant in case No 17 was allowed with costs.

**[4]** A separate judgment has been written in respect of the decision made in case No 17, but no judgment has been written in respect of the decision in case No 19 as no notice of motion for leave to appeal has been filed.

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**[5]** The facts and issues in this case are fairly similar to those in case No 17. The appellant in case No 17 was appointed as a subcontractor by the first respondent to fabricate and supply Precast Reinforced Concrete Piles to the first respondent at the first respondent's project site in Sri Lanka while the appellant in this case was appointed to carry out the piling works for the first respondent.

BRIEF FACTS OF THE CASE

**[6]** On 26 February 2004 the first respondent invited the appellant to tender for the piling works to be carried out in Sri Lanka for the main contractor Wincon Development (Ceylon) Pte Ltd, formerly a wholly owned subsidiary of the first respondent.

**[7]** On 11 March 2004 the first respondent accepted the appellant's tender and issued a letter of acceptance and on 23 June 2004 a subcontract was signed by Cheow Ah Kim ('PW1'), the appellant's husband, on behalf of the appellant and by Goh Youn Peng ('PW2'), the former project manager on behalf of the first respondent.

**[8]** The appellant mobilised her workers, equipment and machinery for Sri Lanka and carried out the piling works from 1 August 2005 to 15 January 2006.

**[9]** Sometime in mid January 2006, the appellant's workers returned to Malaysia for the Chinese New Year holidays but did not subsequently return to Sri Lanka to resume the piling works.

**[10]** On 13 February 2007, the first respondent shipped the appellant's equipment and machinery back to Malaysia.

**[11]** On 6 February 2008 the first respondent sold 75% of its shareholding in Wincon Development (Ceylon) Pte Ltd to Megacorp Bhd.

THE APPELLANT'S CLAIM

**[12]** The appellant contended that the contract entered into with the first respondent was a fixed term contract of five years and a fixed price contract in the sum of RM13,833,473, whereas the first respondent claimed that the contract was a measurement contract.

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**[13]** The appellant claimed that as the first respondent did not request or instruct her workers to return to Sri Lanka to resume work after the Chinese New Year holidays the first respondent had in fact and in law repudiated the contract.

**[14]** The appellant claimed for the following reliefs:

(a) loss of profits at RM2,029,290.26;

(b) rental of equipment at RM20,000 per month from 1 April 2005 till 13 February 2007 (the date the equipment were returned to the appellant);

(c) damages for conversion and detinue of equipment at US$94,213,70; and

(d) declaration that the second and third respondents were jointly liable under s 304 of the Companies Act 1965 for the debt owing by the first respondent.

THE RESPONDENTS' DEFENCE AND THE FIRST RESPONDENT'S COUNTERCLAIM

**[15]** The first respondent contended that they did not terminate the contract but that the appellant had in fact abandoned the contract by sending her workers home to Malaysia in mid January 2006 and failing and/or omitting to send the workers back to work on the project after their holidays.

**[16]** The first respondent claimed that the equipment and machinery in particular the motor vehicles belonged to them.

**[17]** The first respondent also contended that they continued to make advance payments to the appellant even after her workers had returned to Malaysia.

**[18]** The first respondent counterclaimed for the sum of RM99,048 being advances made to the appellant and expenses incurred on her account.

**[19]** The second and third respondents in turn denied the allegation of fraudulent trading under s 304 of the Companies Act and denied all responsibility for the debt, if any, owing by the first respondent to the appellant.

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DECISION OF THE HIGH COURT

**[20]** As stated above, after a full trial, the learned trial judge dismissed the appellant's claim with costs and allowed the first respondent's counterclaim.

**[21]** Being dissatisfied with the decision, the appellant filed her notice of appeal to the Court of Appeal against the whole of the decision.

DECISION OF THE COURT OF APPEAL

**[22]** Upon reading the *rekod rayuan* and the written submissions of counsel for the appellant and the first respondent and upon hearing the oral submissions of counsel aforesaid, the court dismissed the appellant's appeal with costs.

**[23]** Being dissatisfied with the decision the appellant has now filed her notice of motion for leave to appeal to the Federal Court.

GROUNDS OF DECISION

**[24]** Essentially there were five issues to be considered and determined in this appeal namely:

(a) whether there was a valid and subsisting subcontract entered into between the appellant and the first respondent;

(b) whether the first respondent had repudiated the subcontract;

(c) whether any moneys were due and owing by the first respondent to the appellant;

(d) whether the second and third respondents are liable for fraudulent trading under s 304 of the Companies Act; and

(e) whether any moneys were due and owing by the appellant to the first respondent on the counterclaim.

*Point 1 — Bankruptcy of PW1*

(a) Although the subcontract was entered into in the name of the appellant, it was PW1, the appellant's husband who had signed the subcontract on behalf of the appellant and who had conduct of the entire contract. PW1 acted as the manager for the appellant.

(b) PW1 admitted in evidence that he was an undischarged bankrupt. Although PW1 had claimed that the Official Assignee/Director General of Insolvency had knowledge of his employment as the Manager and that he had the permission of the Official Assignee/Director General of

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Insolvency to conduct the business on behalf of the appellant in the subcontract, PW1 had failed to produce any letter or other document as proof that he had obtained the previous permission of the Official Assignee/Director General of Insolvency to work as the appellant's manager and to enter into and carry on the appellant's business. Without such evidence, it was clear that PW1 was taking part directly or indirectly in the management of AK Piling in contravention of s 38(1) of the Bankruptcy Act 1967. Even if the Official Assignee/Director General of Insolvency had knowledge that PW1 was working as the appellant's manager this would still be insufficient without the written permission of the Official Assignee/Director General of Insolvency.

Section 38(1)(d) and (e)(i) of the Bankruptcy Act 1967 in relation to an undischarged bankrupt provide as follows:

> (1)(d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;
>
> (e) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, engage in the management or control of any business carried on by or on behalf of, or be in the employment of, any of the following persons, namely
>
> (i) his spouse;

(see *Topps Co Inc v Mally Jaya Sdn Bhd* [1998] 5 MLJ 744, *Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd* [2007] 7 MLJ 506 (CA) and *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 450 (CA)).

(c) Without the requisite permission, PW1 was not legally competent to act for the appellant. Following the principles in the above three cases, it would mean that PW1's evidence, on his performance as manager of the appellant's subcontract with the first respondent in his capacity as an undischarged bankrupt, cannot be accepted by the court.

(d) It will be noted therefore that without the evidence of PW1, the appellant would not be in a position to even start to prove her case. This would be the case as her other witness PW2, the former project director of the first respondent and a subpoenaed witness, was only able to testify in support of the purported evidence of PW1.

(e) In the circumstances, the learned trial judge was correct to hold that on this ground alone, the appellant's claim could have been dismissed.

*Point 2 — Findings of Fact*

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(a) Most of the findings made in this case by the learned trial judge were findings of facts arrived at after careful evaluation of the evidence. It is trite that in such a situation an appeal court will be slow to intervene with the findings of facts unless such findings were wholly against the weight of the evidence or was perverse.

*Issue 1 — Whether there was a valid and subsisting subcontract entered into between the appellant and the first respondent*

**[25]** It was the first respondent's case that PW2 who had signed the contract on behalf of the first respondent was authorised by the third respondent, a director of the first respondent, to sign the letter of acceptance only and not the subcontract dated 23 June 2004.

**[26]** However, PW2 had stated in evidence that he was authorised to sign not only the letter of acceptance but the subcontract as well on the instructions of the third respondent.

**[27]** We are of the view that the learned trial judge was correct in holding that it was highly improbable that PW2 was authorised to sign the letter of acceptance but not the contract itself. The learned trial judge was correct to conclude that the subcontract comprised of, inter alia, the tender documents, the specifications, schedule of rates, articles of agreement or conditions of subcontract and the bills of quantities.

**[28]** In any event, both parties had relied on the terms and conditions of the entire subcontract during the performance of the piling works by the appellant. Surely, the first respondent cannot now be heard to say that the subcontract does not include other additional documents besides the letter of acceptance. That contention would result in a chaotic state of affairs especially since the first respondent themselves have relied on the subcontract to plead their counterclaim.

**[29]** From all the contract documents it can clearly be concluded that the contract was a measurement contract that is, the appellant would be paid according to the piling works actually carried out at site. PW2 in his evidence testified that measurements were taken for the purpose of valuing the work done by the appellant. The measurements in turn would determine the progress payments to be made to the appellant out of the total volume of work to be done over a period of five years.

**[30]** It is clear from cl 1 of the letter of acceptance that the contract was a measurement contract as the work done by the appellant had to be measured according to the rates specified in the schedule of rates.

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**[31]** At the same time the contract was also a firm price contract in the sense that the price was not to be affected by, inter alia, fluctuations in the cost of wages and materials and import duty or other unforeseen expenditure caused by changes brought about by legislation.

*Issue 2 — Whether the first respondent had repudiated the subcontract*

**[32]** It was the appellant's case that the appellant's workers were requested to return to Malaysia in mid January 2006 for the Chinese New Year holidays and also because the first respondent had encountered problems in obtaining raw materials for the production of piles. It was also alleged by PW2 that the first respondent was facing financial problems and was unlikely to continue with the works.

**[33]** On the other hand it was contended by the first respondent that the workers returned to Malaysia voluntarily for the Chines New Year holidays but regrettably the workers did not return to Sri Lanka to resume the piling works. The third respondent denied there was a shortage of piles for the appellant to work with as there was a stock pile of more than 3,000 reinforced concrete piles, valued at about RM500,000 left on the site when the appellant's workers left for home. PW2 also confirmed that there were more than 3000 piles still left at the project site.

**[34]** Given the fact that there were more than 3,000 piles left at the site and that the appellant could not produce any evidence to show that she had made inquiries of the first respondent as to when the workers could return to Sri Lanka, the learned trial judge was correct to hold that it was highly improbable that the third respondent would have told PW1 that the appellant's workers had to return to Malaysia due to a shortage of raw materials.

**[35]** Further, the evidence showed that even after 15 January 2006, the first respondent continued to make advance payments to the appellant in the total sum of RM122,000 during the period from 27 January 2006 till 9 August 2006. These advance payments were made after the appellant's workers had returned to Malaysia and were not payments made for work already carried out prior to 15 January 2006. The fact that the first respondent could afford to make the advance payments showed that the first respondent was not in financial difficulties as alleged. The first respondent was in fact expecting the workers to return to Sri Lanka and to resume work.

**[36]** It is significant to note that at no time did the first respondent write to the appellant and say that the contract had been terminated. Despite the appellant failing to send her workers back, the first respondent continued to treat the contract as subsisting.

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**[37]** In our judgment we are of the view that the first respondent did not at any time terminate or repudiate the contract. On the contrary it was the appellant who had abandoned the contract and the piling works by not sending her workers back to Sri Lanka.

**[38]** Pursuant to cl 23(a) of the subcontract the first respondent could have by written notice to the appellant terminated the contract when the appellant 'failed to proceed regularly and diligently with the subcontract works' or when the appellant 'without reasonable cause wholly suspends the carrying out of the subcontract works'. Under cl 23(b) the costs, charges and expenses so incurred in completing the subcontract works, together with a reasonable sum by way of overhead charges and supervision can be set off by the first respondent against any monies due to the appellant.

**[39]** Further, pursuant to s 40 of the Contracts Act 1950, the first respondent could have put on end to the subcontract when the appellant refused to perform or disabled herself from performing the piling works in its entirety. But the first respondent did not do so and continued to treat the subcontract as subsisting.

**[40]** We are of the view therefore that the subcontract had been wrongfully terminated by the appellant when her workers had no lawful reason/excuse not to return to Sri Lanka to resume the piling works.

*Issue 3 — Whether any moneys are due and owing by the first respondent to the appellant*

**[41]** As the subcontract had not be terminated by the first respondent, the innocent party, the appellant being the defaulting party was not entitled to commence this action against the first respondent for damages.

**[42]** Since the appellant did not complete the piling works under the subcontract, the appellant is also not entitled to claim the sum of RM2,029,290.26 as loss of profits.

**[43]** The evidence showed that all progress claims made by the appellant had been paid in full by the first respondent.

**[44]** The learned trial judge in her grounds of judgment dealt at length with the appellant's claim to the equipment and motor vehicles and made findings of fact that the appellant had failed to produce documentary proof of registration of ownership of the equipment and vehicles. Accordingly the appellant's claim for conversion and detinue of the equipment and vehicles by the first respondent, including the claim for the rental of the same cannot be allowed.

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*Issue 4 — Whether the second and third respondents are liable for fraudulent trading under s 304 of the Companies Act*

**[45]** This issue was similarly dealt with in the appeal in case No 17 and to avoid repetition here, we refer to the grounds of judgment on issue 3 in that case.

**[46]** Suffice to add that counsel for the appellant had submitted that the appellant was not making the claim as the liquidator of the first respondent for s 304(1) to apply but as a creditor of the first respondent. However to be able to succeed, the appellant must firstly prove that she is a creditor of the first respondent. From the evidence it is clear that the appellant is not a creditor, but on the contrary a debtor of the first respondent, to be able to rely on s 304 of the Companies Act. In any event, there is no evidence to prove a fraudulent intent on the part of the second and third respondents to defraud the appellant.

**[47]** The learned trial judge correctly held that there was no evidence that the second and third respondents had made use of the appellant to get the project running smoothly and then to commercially package it for sale at a profit to a third party. The claim under s 304 of the Companies Act is unfounded, not supported by any evidence and cannot be allowed.

*Issue 5 — Whether any moneys were due and owing by the appellant to the first respondent on the counterclaim*

**[48]** The learned trial judge having done the arithmetic on the sum due and owing by the appellant to the first respondent on the counterclaim held that the appellant still owed the first respondent the sum of RM99,048.68. This was arrived at by deducting the sum of RM304,871.56 being the total value of work done from the sum of RM331,740 being the total amount of cash advances given by the first respondent to the appellant plus the sum of RM72,180.24 being the amount expended by the first respondent in respect of inter alia, air tickets, accommodation, electricity and water charges, security services, purchase of fuel, tools etc.

**[49]** As for the cost of shipping the appellant's equipment back to Malaysia on or about 13 February 2007, the evidence showed that the costs were incurred by the first respondent. As such, this part of the first respondent's counterclaim was allowed.

CONCLUSION

**[50]** In the result, the appellant's claim was dismissed with costs and the first respondent's counterclaim was allowed with costs.

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*Appellant's claim dismissed and decision of the High Court affirmed.*

Reported by Ashok Kumar